Quindell

"Sector Leading Expertise in Insurance and Telecoms"

PRIVATE MOTOR INSURANCE MARKET INVESTIGATION

RESPONSE TO NOTICE OF FURTHER CONSULTATION ON REMEDY 1C

Consulting • Software • Outsourcing • Advisory

IMPORTANT WARNING 3
INTRODUCTION 3
THE CMA'S ALTERNATIVE 1C PROPOSAL – WE NOTE THIS SAYS THE FOLLOWING: 4
QUINDELL'S RESPONSE TO THE CONSULTATION PAPER ON 1C 5
(A) OUR INTERPRETATION OF REVISED REMEDY 1C 6
(B) THE POSSIBILITY OF REMEDY 1C (REVISED) CREATING DISTORTIONS BETWEEN THE PROVISION OF TEMPORARY REPLACEMENT VEHICLES TO NON-FAULT CLAIMANTS AND THE PROVISION OF HIRE VEHICLES TO RETAIL CUSTOMERS? 8
(C) WHETHER THE DEFINITION IN PARAGRAPH 18 WOULD CAPTURE EFFECTIVELY THE PROVISION OF CREDIT HIRE VEHICLES TO NON-FAULT CLAIMANTS OR WHETHER THERE ARE ANY FURTHER CIRCUMVENTION RISKS FROM THIS PROPOSED WORDING. 9
(D) WHETHER THE REMEDY WOULD CREATE DISTORTIONS BETWEEN CHC/CMC PROVISION AND NON-FAULT INSURER PROVISION OF TEMPORARY REPLACEMENT VEHICLES? 10
(E) WHETHER THE COURTS WOULD BE LIKELY TO LIMIT THE SUMS RECOVERABLE IN SUBROGATED CLAIMS TO THE RATE CAP SET BY THE CMA ON THE BASIS THAT THIS INDICATES THE REASONABLE COST, OR, IF NOT, WHETHER THE CAP FOR CHC/CMC PROVISION WOULD HAVE TO BE SET AT A LEVEL WHICH ALIGNED WITH THAT CURRENTLY ALLOWED BY THE COURTS FOR SUBROGATED CLAIMS FOR TEMPORARY REPLACEMENT VEHICLES; AND WHETHER A DUAL-RATE CAP WOULD CREATE GREATER AMBIGUITY FOR THE COURTS IN THESE CIRCUMSTANCES? 10
(F) WHETHER THE REMEDY MIGHT BE EXPECTED TO LEAD TO GREATER PROVISION OF TEMPORARY REPLACEMENT VEHICLES BY NON-FAULT INSURERS UNDER THE TERMS OF INDIVIDUALS' INSURANCE POLICIES, AND THE BENEFITS AND COSTS OF THIS GREATER PROVISION IF IT OCCURRED? 11
(G) WHETHER THIS ALTERNATIVE APPROACH CREATES ANY OTHER UNINTENDED CONSEQUENCES, COSTS OR BENEFITS FROM THOSE ALREADY EXPRESSED? 12
17(B) WHETHER A POSSIBLE DISTORTION IN THE PROVISION OF TEMPORARY REPLACEMENT VEHICLE PROVISION BETWEEN CHCS AND NON-FAULT INSURERS WOULD OCCUR - IF NON-FAULT INSURERS WOULD STILL BE ABLE TO MAKE SUBROGATED CLAIMS AT AVERAGE RETAIL RATES WHICH ARE ABOVE THE ACTUAL COST OF VEHICLE PROVISION. 12
SUMMARY 14

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

IMPORTANT WARNING

We are concerned with the short time in which to consider very technical arguments and legal structure – especially around subrogation and how the courts may react. As a result our thinking, and indeed we expect those of other CHC's to mature with time. The comments made below are from our current thinking – further views may be formed.

INTRODUCTION

Quindell is pleased to provide our response to the CMA's invitation to comment further on its modified Remedy 1C ideas.

We welcome that the CMA has accepted that its original remedy 1C rate cap, as proposed would not be legally enforceable because this would interfere with the absolute legal rights of non-fault claimants under the law of tort to receive reasonable compensation.

Before we respond formally to your variant 1C, we must again place on record a number of points which Quindell has made previously, which either the CMA has failed to understand properly or ignored. Whilst we will not rewrite everything we have previously submitted to the CMA, we must highlight these through this final stage of consultation as they drive right to the heart of the reasonableness and proportionality of the remedy proposed.

- Consumers who suffer loss of damage after a road traffic accident have rights under the law of tort. Those rights are enshrined in common law evolved over 130 years and protected by consumer regulation.

- Direct Hire is not the counter factual to Credit Hire. It is a different service, provided by a single dominant supplier, who through various practices, moves cost from the at fault insurer to the consumer, either by under supply or direct charging.

- Basic Hire Rates (retail rates) are the right comparison to whether the credit hire rates are reasonable and recoverable in law.

- If the CMA wishes to alter this balance, they must present a case to Government and encourage Parliament to change those rights, not seek to influence them through other means.

- The CMA has erred in concluding the 'separation' leads to consumer detriment. Separation protects consumer's rights. Consumers have the right to source a vehicle from whoever they choose to satisfy their legal rights. The CMA seeking to encourage consumers to choose one supplier over another is unfair, unjust and should not be their role.

- The CMA has not found any evidence that there are any behaviors or practices, which lead to inefficiency or increase unnecessarily transactional or frictional cost. The transactions and friction is a symptom of the law of tort, where it is right that one party seeks to reduce the cost to the minimum, whereas the other party seeks to satisfy their legal rights. This creates, at times, natural

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

friction of competing priorities and is health in a mature legal system. The courts guide us in terms of what is reasonable.

- As such, there is no Adverse Effect on Competition (AEC).
- There is no need for any remedies. Consumers have the right to be placed back in the position if the accident had not occurred, they have the right to choose who provides service to them and so long as those costs are reasonable, they will be settled by the at fault party (or their indemnifying insurer).
- A perverse situation is created where an impecunious claimant would be able to recover a lower rate under the proposed cap than someone with financials means who paid upfront on their debit card for mobility. How can this be right?
- The risk of unintended consequences where a consumer could recover a higher rate than they were liable to pay – would they keep the margin for themselves?

We also remain concerned that the alternative proposal suggested by the CMA will also not be enforceable because of:

- this same legal hurdle (and others such as Coles v Hetherton / Bee v Jenson);
- it leading to unintended consequences;
- it leading to market distortion and force CHC's into an automatic breach of the Consumer Contracts Regulations 2013 through their need to comply with existing legal regulations such as Doorstop selling regulations.

THE CMA'S ALTERNATIVE 1C PROPOSAL – WE NOTE THIS SAYS THE FOLLOWING:

[Paragraph 14] "Prior to the publication of our PDR, one party raised some concern about whether we would have powers to implement the remedy as we intended and made an alternative proposal, which we summarised in the PDR (see paragraphs 2.62 and 2.63).

Under this proposal, instead of capping the claims made by CMCs/CHCs on behalf of claimants and the subrogated claims made by non-fault insurers, the amount which would be capped would be that which a replacement vehicle provider charges its customers for the vehicle hire. By capping the contractual liability of the claimant for the vehicle, the amount which the replacement vehicle provider (or a solicitor) would be able to claim in tort on behalf of the claimant would also be capped.

This alternative implementation approach would not apply to non-fault insurers as in such cases there is no charge for the temporary replacement vehicle provided.

[Paragraph 18] With regard to paragraph 17(a), we could seek the remedy to apply to:

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

(a) any entity providing temporary replacement vehicles to non-fault claimants pursuant to a credit agreement with that entity, directly or indirectly;[6] and/or

(b) any entity providing temporary replacement vehicles and providing, directly or indirectly,[7] assistance to the claimant to recover the costs of provision of a temporary replacement vehicle from an at-fault driver/ insurer on the basis of the claimant's tortious rights.

Footnote 6 - Indirectly means either through ownership of another entity or through contractual arrangements with another entity. For example, where a replacement vehicle provider provides the vehicle and has a contractual arrangement with a credit provider to provide the credit.

Footnote 7 - As above, indirectly means either through ownership of another entity or through contractual arrangements with another entity. For example, where a CHC has an agreement with a firm of solicitors and makes referrals to that firm"

[Paragraph 19] Under this definition, an individual non-fault claimant would still be able to go to a vehicle hire retail outlet, rent a vehicle on a credit or debit card and seek to recover the cost themselves. However, we would not expect this to happen in many cases.

QUINDELL'S RESPONSE TO THE CONSULTATION PAPER ON 1C

We have considered the proposed revisions to 1C in the following areas based also on the CMA's questions in paragraph 21;

a) Whether this would be an effective way to implement 1C;

b) The possibility of remedy 1C (revised) creating distortions between the provision of temporary replacement vehicles to non-fault claimants and the provision of hire vehicles to retail customers;

c) Whether the definition in paragraph 18 would capture effectively the provision of credit hire vehicles to non-fault claimants, or whether there are any further circumvention risks from this proposed wording;

d) Whether the remedy would create distortions between CHC/CMC provision and non-fault insurer provision of temporary replacement vehicles?

e) Whether the courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA on the basis that this indicates the reasonable cost, or, if not, whether the cap for CHC/CMC provision would have to be set at a level which aligned with that currently allowed by

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

the courts for subrogated claims for temporary replacement vehicles; and whether a dual-rate cap would create greater ambiguity for the courts in these circumstances?

f) Whether the remedy might be expected to lead to greater provision of temporary replacement vehicles by non-fault insurers under the terms of individuals' insurance policies, and the benefits and costs of this greater provision if it occurred?

g) Whether this alternative approach creates any other unintended consequences, costs or benefits from those already expressed?

We also note paragraph 17(b) noting the following question:

Whether a possible distortion in the provision of temporary replacement vehicle provision between CHCs and non-fault insurers would occur - if non-fault insurers would still be able to make subrogated claims at average retail rates which are above the actual cost of vehicle provision.

(A) OUR INTERPRETATION OF REVISED REMEDY 1C

We understand that the CMA are considering retaining the core elements of 1C – which include a dual rate system with capped rates at roughly direct hire and GTA rates, but that the rate caps will be enforced by restricting the amount that CHC's can charge their customers.

The CMA considers ensuring that all CHC's are caught by the proposed wording 18 (a) and (b).

Would this alternative remedy proposal be an effective way to implement 1C?

We do not believe the revised 1C would be effective to implement nor reasonable and proportionate for the following reasons;

1. The risk of circumvention remains high. CHC's could avoid providing credit hire services in the form covered by remedy 1C, or provide pre-funded "pre cards" on which to technically enable claimants to obtain credit. Short-term (payment on demand) agreements could be used with CHC's simply using forbearance to sue as a technical argument to avoid "sham" arguments.

   The exact nature of what might emerge would clearly depend on what the CMA drafts in any enforcement order (and which is not struck down at appeal). But we think that if CHCs are to retain their ability to handle some 300,000 claims a year, the CMA needs to word its remedy to make this possible.

   Otherwise, it is clear that the CMA is drafting this remedy to restrict or inhibit CHC's from providing service, and deny consumers the choice of their assistance in non-fault accidents. That too could be another ground of appeal that the CMA is exceeding its authority, and interfering with the rights of claimants to choose who can assist to handle their claims against at-fault insurers, and/or unlawfully interfering in the value of the claim.

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION. WWW.QUINDELL.COM

2. The revised proposal provides an unfair imbalance whereby insurers (and claimants not using CHCs) could still recover BHR or commercial rates at much higher levels than the proposed rate cap imposed on claimants using CHCs, through subrogation;

3. This revised remedy would provide financial incentives for companies to set up and apply subrogated models to recover credit hire charges at levels above the cap (as in the DAS case of Bee v Jenson);

4. It would / could lead to vertical integration of CHC's into insurers and it would not reduce any alleged AEC – also tilting the power towards insurers by making it harder for CHCs to provide service under this remedy regime which will restrict choice and availability;

   NOTE to the CMA - the CMA needs to appreciate that direct hire providers will only get involved once the insurer has accepted the claimant, whereas CHCs accept a claimant from FNOL stage at the CHCs risk, based on their expertise to recognise a claim is legitimate and can be won, if challenged. Lay claimants do not have this ability, unless they have funds, resources or insurance to deal with this risk of loss;

5. The proposed wording would not apply to insurers as they would not be affected by the imposed rate cap. They could therefore pay full rates and recover through subrogation (please can the CMA refer to the judgments of Bee v Jenson, Coles v Hetherton and Bent v Highway cases for analysis on the subrogation models for mobility and also repair examples). The current law of tort prohibits the CMA under the Enterprise Act from enacting these changes as proposed – just as the CMA accepted with their previously worded 1C. Unfortunately, the consultation document has omitted any reference to these important cases, and how the remedy can be made consistent with this case law precedent for Courts handling claimants common law claims – we hope the CMA can provide its views on this case, as soon as possible, which suggests to us that insurers are permitted to recover costs above actual costs incurred (as long as they are reasonable).

6. Bee v Jenson is the precedent case-law which the Courts would refer to in determining whether the subrogated rate was reasonable and the CMA cannot change law that has stood for over 130 years. The CMA's lower caps are based on information never disclosed to parties in this investigation; and worse, we disputed these artificially low rates (but were ignored). Whether at-fault insurers can obtain vehicles more cheaply than CHCs is an irrelevant consideration based on the Bee v Jenson judgment. That judgement in our view, also restricts the freedom of the CMA in proposing or implementing remedies that are inconsistent with this legal precedent. Does it have Counsel's opinion on this subject, and please can this be published in full.

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

7.

8. Remedy 1C would impact on other industries such as short term rental companies and be difficult to control;

9. The dual rate cap cannot be legally provided by CHC's without breaching Consumer Contracts Regulations 2013 (as previously submitted by Quindell in our provisional findings response). Dual caps would also create confusion with consumers.

10. We are concerned that the CMA are actively seeking to now promote bilateral agreements. We have previously urged the CMA to properly investigate bilateral agreements as we have raised concerns over their real value to consumers and the potential for the rates being quoted by insurers as cheap buy in rates which allow the direct hire provider (the rental company) free to upsell insurance at the consumers cost.

11. Direct Hire is not the counter factual to Credit Hire. It is a different service, provided by a single dominant supplier, who through various practices, moves cost from the at fault insurer to the consumer, either by under supply or direct charging.

(B) THE POSSIBILITY OF REMEDY 1C (REVISED) CREATING DISTORTIONS BETWEEN THE PROVISION OF TEMPORARY REPLACEMENT VEHICLES TO NON-FAULT CLAIMANTS AND THE PROVISION OF HIRE VEHICLES TO RETAIL CUSTOMERS?

1. We believe that there is significant risk of modified 1C creating distortions in the retail hire market. The wording as drafted at paragraph 18 would have the unintended consequences of causing compliance issues for the UK retail and leisure market (eg with Europcar, Avis, Hertz, Enterprise etc). Has the CMA sought views from these businesses on such problems?

2. Rental providers often provide part of the charges incurred, on credit – they may take a credit card swipe which technically provides a period of credit to the renter. How will the CMA deal with this?

3. If that model was assessed to <u>not</u> be caught by remedy 1C in any revised wording for this remedy, we foresee CHC's adopting similar models. If they are caught would leisure customers quickly become aware that by informing their local Avis station (after going to rent a car) that they had just had a non-fault accident <u>so that</u> they would avail themselves of a cheaper rate?

4. The CMA also needs to ask whether rental companies would refuse to provide hire to such customers [in non-fault accidents]? Would the CMA expect retail and leisure rental companies to have to validate or ask questions before providing hire to avoid breaching the rate cap themselves? How will they explain this pricing differential to consumers, and will it be prominently displayed at

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION. WWW.QUINDELL.COM

retail branches. How will they answer consumers complaining that they cannot avail themselves of the lower capped rates?

5. Has the CMA written to or communicated with the retail and leisure rental companies of the UK to explain that they may have a rate cap imposed on some of their customers? That in our view is necessary, and we request to see the responses.

6. How would the rental companies know whether they have charged the correct rate – and in turn unwittingly breached a rate cap? Would remedy 1C become another new area of friction between claimants, insurers and any other parties involved in claims (ie not called CHCs any more);

7. How many rentals are currently provided to people who have hired TRVs, following a non-fault accident?

8. What about split liability cases? Who determines 100% that at the point the rate cap is applied that liability is resolved? Also, when there are multicar accidents, how will this remedy enable quick processing of the TRV claims? What happens when foreign drivers, and insurers are involved, or commercial vehicles?

9. Please can the CMA provide some worked examples and detailed guidance on how it sees revised remedy 1C applying in a variety of practical situations? All this needs to be issued for consultation before the CMA report is finalized.

(C) WHETHER THE DEFINITION IN PARAGRAPH 18 WOULD CAPTURE EFFECTIVELY THE PROVISION OF CREDIT HIRE VEHICLES TO NON-FAULT CLAIMANTS OR WHETHER THERE ARE ANY FURTHER CIRCUMVENTION RISKS FROM THIS PROPOSED WORDING.

Due to the CMA not having the right to change consumers rights post accident, the general rights of the consumer to recover a reasonable BHR or credit hire rate remains intact business providing this service to consumers will always seek to maximize their profit to the level allowable by the courts. There is nothing wrong with this – this is what business does.

We believe that circumvention remains a high risk. Specifically the following are a small list of possibilities that the CMA needs to recognise;

- The definition of credit hire / replacement vehicle could change;
- Goods and services could be re-badged under ‘contract’;
- Credit may not be provided as terms and conditions could be changed;
- The remedy increases the risk of subrogation routes to market as proven by DAS in the case of Bee v Jenson. These business models already exist.

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

(D) WHETHER THE REMEDY WOULD CREATE DISTORTIONS BETWEEN CHC/CMC PROVISION AND NON-FAULT INSURER PROVISION OF TEMPORARY REPLACEMENT VEHICLES?

We believe that the proposed remedy 1C alternative would create distortions for the following reasons;

- Insurers could provide hire vehicles to non-fault customers and recover at BHR (or higher) subrogated rates.
- Insurers would use the Bee v Jenson caselaw as precedent for recovery above the CMA;
- Non-fault Insurers would have a pricing advantage over CHC's and be able to offer referral fees or even direct hire to consumers who were not their [insurance] customer to provide replacement vehicle services. How does the CMA justify this price discrimination favoring insurers, at the expense of CHCs?
- There would be no reduction in the CMA's calculated AEC (which Quindell does not accept exists). If the CMA is not able to produce a robust alleged detriment at the end of this investigation, modified remedy 1C is legally impossible to justify.
- The CMA would tilt the profit and supply chain model to one where the price cap restricts CHC's from operating in a competitive and orderly market. In a short space of time, the competition for non-fault claimants from CHCs could be eroded, leaving no choice for a large proportion of claimant, who find their claims rejected. How can the CMA justify this detriment on consumers from its remedy?
- CHC's would cease to exist and vertically integrated insurer subrogation would occur; and if CHCs go out of business, surely that will be the result of this remedy – could the CMA be liable for damages from this? We request that an answer to this objection is included in any final decision.

(E) WHETHER THE COURTS WOULD BE LIKELY TO LIMIT THE SUMS RECOVERABLE IN SUBROGATED CLAIMS TO THE RATE CAP SET BY THE CMA ON THE BASIS THAT THIS INDICATES THE REASONABLE COST, OR, IF NOT, WHETHER THE CAP FOR CHC/CMC PROVISION WOULD HAVE TO BE SET AT A LEVEL WHICH ALIGNED WITH THAT CURRENTLY ALLOWED BY THE COURTS FOR SUBROGATED CLAIMS FOR TEMPORARY REPLACEMENT VEHICLES; AND WHETHER A DUAL-RATE CAP WOULD CREATE GREATER AMBIGUITY FOR THE COURTS IN THESE CIRCUMSTANCES?

The CMA appears not to fully understand the basis on which English law operates. The essence of English common law is that it is made by Judges sitting in courts, applying legal precedent (stare decisis) to the facts before them. We respectfully refer the CMA again to the judgments of Bee v Jenson and Coles v Hetherton

In Bee v Jenson a subrogated hire at GTA rates was pursued. The judges at the Court of Appeal found that he tort feasor was solely concerned with the reasonableness of the charges assuming a need for a replacement vehicle. If they are reasonable then he must pay them, whatever insurance arrangements Mr Bee may have made, or more importantly whatever arrangements Mr Bee's insurers may have made.

In Coles, attempts to argue that claimants should have mitigated their loss, by seeking to have the cost of repairs done at a lower rate, were found to be misguided. Those arguments misunderstood the role of the cost of repairs. The Court summarized the position:

'…if a claimant, whose damaged chattel is capable of economic repair, chooses to repair it at a cost which is not reasonable, then the reason why he cannot recover that unreasonable cost as damages will be because

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION. WWW.QUINDELL.COM

that cost does not represent the diminution in value of the chattel. What is the diminution in value of a chattel or the "reasonable cost of repair" will always be a question of fact for the trial judge to determine if it is in dispute.'

To put this another way, in essence, it seems that the rule as to the recoverability of loss sustained by a claimant is based on the claimant taking reasonable steps to mitigate his loss (commonly called the 'duty to mitigate'). This applies to loss (direct or consequential).

It does not apply to the steps taken to remedy the loss, the cost of which is only evidence of what the loss actually was. A claimant can be as indolent as he wants to be in trying to find a reasonable and competitive rate to get his vehicle fixed at in the open market, but that lack of effort will damage the credibility of his invoice as evidence that the figure he paid properly represents the true diminution in value he sustained in the RTA. The actual cost is not necessarily the reasonable cost.

In reaching the decisions in both cases, the court relied on two basic long-settled law principles:

1. 'Even in a case where a claimant is insured in respect of the loss suffered as a result of the tortfeasor's wrong and the insurer has indemnified the insured and becomes subrogated to the insured's right against the tortfeasor, the cause of action against the tortfeasor remains that of the claimant, unless it is specifically assigned to the insurer'; and

2. 'in respect to loss which is covered by insurance, the benefits obtained under the insurance are irrelevant in assessing the correct measure of damages recoverable'. The Court referred with approval to the view in Bee v Jenson (No.2) [2008] Lloyd's Rep IR 221, that "defendants have had to accept that a claimant's insurance arrangements are irrelevant and cannot be prayed in aid to reduce their liabilities'.

In summary therefore the rate cap under subrogated claims would be a rate reasonable in the claimants shoes to recover. This would be the BHR or the full credit rate (if impecunious). What cap the CMA attempts to propose is wholly irrelevant.

(F) WHETHER THE REMEDY MIGHT BE EXPECTED TO LEAD TO GREATER PROVISION OF TEMPORARY REPLACEMENT VEHICLES BY NON-FAULT INSURERS UNDER THE TERMS OF INDIVIDUALS' INSURANCE POLICIES, AND THE BENEFITS AND COSTS OF THIS GREATER PROVISION IF IT OCCURRED?

For the reasons set out above we believe that there is significant risk that policy wording would be changed to ensure that replacement vehicle costs would be recovered via subrogation.

The costs could be significantly higher than the current CHC cost to insurers. We request that the CMA tries to quantify this, before it finalizes its report. The conclusion should be that the remedy 1C is disproportionate to its aim, and more onerous than eg the GTA alternatives that exist now.

We note that DLG within their response to the provisional decision on remedies report stated that they

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

expected in subrogation circumstances that (3.10 (a);

In these circumstances, insurers would have every incentive to control TRV costs for which they are liable and although they may see advantages in seeking to recover at prevailing (reasonable) retail rates when they are acting for the non-fault party, they will recognise that the incentives are reversed when they are acting for the at-fault party.

We ask the CMA why insurers would adopt such an approach. How effective have bilateral arrangements been so far? Insurers seek to use their financial buying power and economies of scale to generate value over their competitors. Why would insurer give such an advantage up? Brokers who do not incur the indemnity spend when their customer is at fault would sit outside such arrangements yet could still provide a subrogated non fault mobility service.

There can be no certainly that insurers would adopt such an approach.

(G) WHETHER THIS ALTERNATIVE APPROACH CREATES ANY OTHER UNINTENDED CONSEQUENCES, COSTS OR BENEFITS FROM THOSE ALREADY EXPRESSED?

We are concerned that placing price caps on what credit hire companies or companies that provide TRV's may without intention capture leisure rental market companies and transactions.

If a consumer who has been involved in a non fault accident goes into a rental company and hires a car (without explaining that they have recently had a non fault accident) technically the TRV would be caught by the CMA's proposed wording and the rental company would breach the cap without knowledge.

In other words, the CMA demands the rental company charges these parties walking in to their branches, or acquiring their car over the internet, at some low imposed lower cap. If the claimant pays the higher sum, what happens of they then ask a CHC to assist with the recovery?

It would provide subrogation at a higher margin and price point than credit hire under the GTA.

The GTA would undoubtedly collapse leading to higher prices without durational control that the GTA provides. And what does the CMA intend to put, in place of the GTA, as its collapse should be foreseen as an inevitable consequence of this remedy 1C.

17(B) WHETHER A POSSIBLE DISTORTION IN THE PROVISION OF TEMPORARY REPLACEMENT VEHICLE PROVISION BETWEEN CHCS AND NON-FAULT INSURERS WOULD OCCUR - IF NON-FAULT INSURERS WOULD STILL BE ABLE TO MAKE SUBROGATED CLAIMS AT AVERAGE RETAIL RATES WHICH ARE ABOVE THE ACTUAL COST OF VEHICLE PROVISION.

As we have previously outlined, legally the CMA cannot control the pricing recovery levels of subrogated claims ie its powers do not let it do this. As non-fault insurers would still be able to make and recover subrogated claims at rates higher than the CMA is proposing to cap, that surely is not fair, reasonable or

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION. WWW.QUINDELL.COM

justified in the circumstances of this investigation.

We are deeply concerned that the CMA believes that any judge would overturn precedent case law from the court of appeal in Bee v Jenson and simply decide to ignore it because the CMA (an organisation with no relationship to the court) has suggested that rates can be acquired for a lower rate.

The COA have already assessed this issue around subrogation and found that it is the rate that is reasonable for a claimant to acquire – not some volume buying power rate that an insurer and nobody else can acquire.

We are concerned at the CMA's use of "average retail rates". Please can it say who suggested this idea, and why? The use of this terminology demonstrates that the CMA still does not understand the legal basic rate that a claimant can recover under the law of tort.

Average retail rates have little (if any) relevance in the context of lawful recovery of TRV costs. We request the CMA updates it's thinking on this issue. We also request that the CMA publishes its decisions arising from this round of consultation, assuming remedy 1C is not dropped.

The CMA's proposed 1C remedy risks yet again an idealised world not supported by law, where insurers get cheap rates for direct hire, but the real cost of mobility is passed onto unsuspecting consumers though direct hire providers upselling insurance which should nit be born by the not at fault party – a REAL additional cost to consumers.

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

SUMMARY

1. The CMA has still failed to quantify any AEC in relation to credit hire. The CMA are attempting to erroneously suggest that direct hire and credit hire are the same. Evidence has been provided and we have pointed the CMA to the issues surrounding direct hire not being the same service as credit hire on numerous occasions.
2. The evidence that the CMA is relying upon for direct hire rates is incorrect – the rates insurers obtain are discounted to levels consumers could never acquire and are artificially low by the direct hire provider as they upsell insurance and additional products to make margin.
3. Those products are at a real cost to the consumer – where if they choose credit hire the cost is passed onto the at fault insurer as the claimant is legally entitled to do so.
4. The CMA cannot enact its changes under the Enterprise Act.
5. Just because the legal position is that a BHR or credit rate is recoverable does not mean that there is an AEC.
6. The CMA is biased towards insurers and continues to make numerous factual errors including;
    a. Use of wording of "subrogation" when claims are not subrogated;
    b. Failure to take and disclose proper legal understanding of the market and consumes rights;
    c. Use of wording such as "average retail rates" – what are these and why is the CMA using unknown language or rates?
    d. The CMA even now attempts to suggest that bilaterals should be progressed by the market. Why? What investigations surrounding the impact on consumers has the CMA undertaken around bilaterals? We haven't seen any published.
    e. The CMA continues to blindly attempt to change the very clean scope of its investigation to include business use – again we ask why?
    f. What evidence does the CMA have that insurers would pass on savings? Insurers work on cycles where they deliberately may increase price to become unattractive as they hit certain "optimum" policy count levels.
7. Any price cap cannot be applied to subrogated claims – providing a simple way of circumvention and / or a market where CHC's cannot charge the same as insurers.
8. Insurers want to pass on the real cost of mobility (in part) onto consumers through allowing rental providers to upsell at their cost.
9. A dual rate cap cannot be legally applied in any event as it would force CHC's to breach Consumer Contracts Regulations 2013.

© 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

 © 2014 - QUINDELL PLC. ALL RIGHTS RESERVED. DO NOT DISTRIBUTE WITHOUT PERMISSION.

Quindell

Quindell Court 1 Barnes Wallis Road Segensworth Fareham Hampshire PO15 5UA

+44 (0)148 986 4200 +44 (0)148 986 4251 www.quindell.com info@quindell.com